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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 1158

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GEORGE A. EARNHARDT,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUP-
PORT THEREOF.

WALTER E. WILES and
WALTER W. DUFT,
Attorneys for Petitioner.



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vs.

GEORGE A. EARNHARDT,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Now comes GEORGE A. EARNHARDT, petitioner, by his counsel, and respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered March 26, 1946, (R. 250) affirming the judgment of the United States District Court for the Southern District of Indiana in the cause entitled "United States of America, plaintiff-appellee vs. George A. Earnhardt, defendant-appellant" and being numbered 8866, which cause was heard by that court on January 15, 1946, and an opinion filed February 19, 1946, (R. 243). The Petition for Rehearing was denied by the said court on March 26, 1946 (R. 250). On its order entered March 29, 1946, the said Circuit Court of Appeals stayed the Mandate herein pursuant to its Rule No. 25.

SUMMARY OF MATTER INVOLVED

This is a criminal proceeding wherein the petitioner was indicted by the Grand Jury for the United States District Court for the Southern District of Indiana, Indianapolis Division, charging this petitioner and others with devising a scheme or artifice to defraud and with using the United States mails with the intent and purpose of executing the said scheme or artifice in eight counts. A ninth and tenth count charged this petitioner and one Henry M. Schneider with unlawful sale of a security by use of the United States mail. An eleventh count charged the petitioner with conspiring with others to commit the acts charged in the other counts. Demurrer to the Indictment was overruled and on trial by jury, a general verdict of guilty was found. Judgment was entered on the verdict. This petition involves the questions as to whether the demurrer should have been overruled and whether petitioner was accorded a fair and impartial trial.

QUESTIONS PRESENTED

The questions presented are:

1. (a) Whether each count of the Indictment charges an offense.

(b) Whether if the substantive counts of the Indictment fail to charge an offense a general verdict comprehending all counts can be sustained where the good counts are under statutes which do not permit the sentence imposed by the judgment.

2. Whether petitioner was accorded a fair trial with due process of law.

STATEMENT

The Indictment (R. 1-25), containing eleven counts, charges petitioner and Henry M. Schneider in the first count thereof, paragraphs 1 to 9 of the said count that they unlawfully, wilfully, knowingly, fraudulently, and feloniously devised and intended to devise a certain scheme or artifice to defraud certain persons therein named, enumerating in the said paragraphs 1 to 9 of the said count, the facts which were alleged to constitute the said scheme or artifice. This count further alleges in paragraph 10 thereof that this petitioner and said Henry M. Schneider for the purpose and with the intent of executing the said scheme or artifice placed a certain letter in the United States mails, which letter is set out verbatim in the said count (R. 1-9).

Each of the counts II to VIII, inclusive, of the said Indictment, incorporates paragraphs 1 to 9, inclusive, of the first count by reference, and then charges the mailing of a letter, which letter is incorporated verbatim in each count (a different letter for each count). Counts IX and X of the said Indictment incorporates paragraphs 1 to 9, inclusive, of the first count by reference and then charge this petitioner and Henry M. Schneider with unlawfully, knowingly, wilfully, fraudulently, and feloniously, in the sale of a security, employing said scheme or artifice to defraud by use of the United States mails, and the use of said mails for the mailing of a letter, which letter is incorporated verbatim in each count (a different letter for each count).

Count XI charges this petitioner and Henry M. Schneider with conspiracy "to commit certain offenses against the United States of America" i. e. the "offenses" described

in counts I to X, both inclusive, of the Indictment, which counts are therein incorporated by reference and certain purported overt acts of mailing are alleged.

Demurrer was filed challenging all counts (R. 26-32), both in that they failed to state an offense and in that they were ambiguous and indefinite and therefore void. The demurrers were overruled (R. 32), and on the trial of the case the trial judge intervened in the proceeding, examined and cross-examined witnesses, and made remarks in the presence of the jury which petitioner contends were prejudicial to his interest, and commented throughout the trial in a manner which the petitioner contends was prejudicial to him. The instances referred to are numerous and consume many pages of the transcript of record in this proceeding in their aggregate. The principal conduct and comments of the court complained of appear on the following pages of the record 38, 39, 40, 47, 50, 55, 60, 62, 69, 71, 83, 84, 86, 87, 88, 90, 92, 93, 99, 101, 102, 103, 104, 105, 106, 107, 110, 112, 113, 114, 117, 118, 119, 122, 125, 126, 127, 128, 129, 130, 131, 134, 135, 136, 140, 141, 142, 143, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 171, 172, 176, 179, 180, 183, 184, 185, 186, 189, 196, 200, 201, 205, 206, and 207.

The details of much of this comment are set forth in the Brief and Argument submitted in support of this Petition.

REASONS RELIED ON FOR ISSUANCE OF WRIT

1. The decision in this case is contrary to, but without direct reversal of, the decision of the same Circuit Court of Appeals in the case of *Verna vs. U. S.* 54 F. (2) 919, and is also contrary to the rule laid down by this court in the case of *U. S. vs. Hess*, 8 S. Ct. 571, and should be reviewed to clarify the rule in this Circuit.

2. The Court of Appeals in this case has violated the rules enunciated by this court in the case of *Bollenbach vs. U. S.*, 66 S. Ct. 402, by assuming that the erroneous conduct of the trial judge can be cured by the verdict if there is any evidence to sustain a verdict, and there is involved the constitutional right of this petitioner to a fair and impartial trial, which is denied by reason of this erroneous construction of the rule enunciated in the Bollenbach case by the United States Circuit Court of Appeals. Hence, this case should be reviewed to preserve this constitutional right.

Respectfully submitted,

WALTER E. WILES and

WALTER W. DUFT,

Attorneys for Petitioner.